

Kelco Roofing, Inc. and Local Union 135, United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO. Case 10-CA-17626

28 December 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 10 May 1983 Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order as modified.

Respondent Kelco contends, inter alia, in its exceptions, that there is no substantial record support for the judge's finding that the Respondent, through its president, John Kelly, violated Section 8(a)(1) of the Act by interrogating employee-applicant² William Singfield Sr. about his membership in the Union. We find merit in the Respondent's contention.

The judge found that, on 28 October 1981, Singfield came to the Respondent's facility seeking employment as a journeyman roofer. According to the testimony of the Respondent's president, Kelly, and Singfield's repeated, direct testimony, the following exchange occurred: Kelly asked Singfield where he had been working and Singfield named a local roofing company that was widely known to be unionized. Kelly then told Singfield, "Well, you know we are non-union out here." On cross-examination Singfield repeated his conversation with Kelly substantially as set forth above, but he then added that Kelly asked him whether he was a member of the Union.

The judge credited Singfield's later testimony that Kelly had interrogated him about his union membership. In making this credibility choice, the judge found that it would have been "perfectly natural" for Kelly to have asked about Singfield's union affiliation and that it is "unbelievable" that

Kelly "simply volunteered the observation that Respondent was still non-union."³

The Supreme Court has noted that a judge's findings are of consequence "to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing."⁴ The Court has further stated that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."⁵ Here, the judge's findings are not based on his observation of the witnesses' demeanor, but, rather, on his assessment of the inherent probability of the conflicting testimony. The judge is in no better position than the Board to assess inherent probabilities and the Board is not bound by credibility determinations based on such assessments.

We cannot agree with the judge that Kelly's version of the conversation which was corroborated by the Respondent's vice president, Long, and by Singfield's direct evidence was "unbelievable." Nor can we agree with the judge's finding that Singfield's later, uncorroborated account of the conversation on cross-examination is "natural and logical." Where, as here, an administrative law judge's credibility choice is based on an illogical or inadequate rationale, the credibility resolution itself must fall.⁶ Accordingly, we reverse the judge's finding that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Singfield about his membership in the Union.

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 3 and renumber the subsequent Conclusions of Law accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kelco Roofing, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

¹ Member Zimmerman would adopt all of the judge's rulings, findings, and conclusions and the recommended Order. For the reasons stated by the judge, Member Zimmerman would accept the judge's credibility resolution and affirm the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employee Singfield about his membership in the Union. See his dissenting opinion in *Herbert F. Darling, Inc.*, 267 NLRB 476 (1983).

² Singfield was applying for a job at the time of the alleged interrogation and was employed by the Respondent on that same day.

³ Singfield had previously been employed by the Respondent.

⁴ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

⁵ *Id.* at 488.

⁶ *Custom Recovery v. NLRB*, 597 F.2d 1041, 1045 (5th Cir. 1979). See also *NLRB v. E-Systems*, 642 F.2d 118, 121 (5th Cir. 1981).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge our employees because of their activities on behalf of, and in support for, the Union or any other labor organization.

WE WILL NOT assault representatives of the Union or any other labor organization in the presence of employees, thereby restraining and coercing employees in the exercise of their rights under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Henry Hooks and William Singfield Sr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify Henry Hooks and William Singfield Sr. that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

KELCO ROOFING COMPANY, INC.

DECISION

STATEMENT OF THE CASE

PHILIP P. McLEOD, Administrative Law Judge: This case was heard before me on August 25, 26, and 27, 1982, in Atlanta, Georgia. It originated from a charge filed on November 9, 1981,¹ in the above-captioned case against Kelco Roofing Company, Inc., herein called the Respondent, by Local Union 135, United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO, herein called the Union.

On December 15, a complaint and notice of hearing issued alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, by various acts and conduct, including discharging employees Henry Hooks and William Singfield, Sr., on November 5, 1981. In its answer to the complaint, the Respondent admitted certain allegations, including the filing and serving of the

charge, its status as an employer within the meaning of the Act, and the status of the Charging Party as a labor organization within the meaning of the Act. The Respondent denies that it discharged Hooks and Singfield, and further alleges alternatively that if it did discharge them its actions on November 6 constituted an offer to rehire Hooks and Singfield. The Respondent denies having engaged in any conduct which would constitute an unfair labor practice.

At the trial herein, all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, both parties timely filed briefs with me which have been duly considered.

Upon the entire record in this case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Kelco Roofing Company, Inc., is a Georgia corporation whose principal office and place of business is located in Atlanta, Georgia. In business since 1973, it is primarily engaged in reroofing existing buildings and roofing new ones.

During the past calendar year, which period is representative of all times material herein, the Respondent performed services valued in excess of \$50,000 directly for customers located outside the State of Georgia and purchased and received at its Atlanta facility finished products valued in excess of \$50,000 directly from suppliers located outside the State of Georgia.

The Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

Local Union 135, United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Allegations and Issues*

The complaint alleges that on or about October 27, 1981, the date Singfield applied for work with, and was hired by, the Respondent, the Respondent's president, John Kelly, interrogated Singfield about his union membership. It also alleges that, on or about November 5, Kelly assaulted and battered union representative John O'Neal in the presence of employees and, on that same day, discharged Henry Hooks and William Singfield, Sr., because of their activities on behalf of, and support for, the Union. In simplest terms, counsel for the General Counsel argues that, when the Respondent observed Hooks and Singfield talking to O'Neal on the sidewalk adjacent to the Respondent's facility on the morning of November 5, the Respondent immediately discharged Hooks and Singfield and then proceeded to assault O'Neal in their presence.

¹ Unless otherwise specified, all dates herein refer to 1981.

The Respondent admits that Singfield and Hooks were sent home that morning, but argues that this had nothing to do with their talking to O'Neal. Rather, the Respondent argues that they were sent home solely because rain was predicted for that day and reroofing cannot be done in the rain. As previously noted, the Respondent also argues that, even if it discharged Hooks and Singfield on November 5 for proscribed reasons, it nevertheless offered them reinstatement on the following day. The Respondent further denies both the alleged interrogation and the assault.

B. The Alleged Interrogation

On October 28, 1981, William Singfield, Sr., herein-after called Singfield, went to the Respondent's facility looking for work as a journeyman roofer. Singfield had worked for the Respondent in the past. On October 28, Singfield spoke to John Kelly, Respondent's president; Michael Long, its vice president; and Jim Ripley, who now does most of the hiring for the Respondent. According to Singfield, during the conversation with Kelly, Long, and Ripley, and after he was told that work was available, Kelly asked Singfield where he had been working. Singfield responded that he had been working at Sanders, a roofing company in Atlanta where employees are represented by the Union. According to Singfield, Kelly asked, "Are you a member of the Union?" Singfield replied, "Yes." Kelly then responded, "Well, you know we are non-union out here."

Kelly denies asking Singfield if he was a member of the Union. Kelly claims that, during the conversation between Singfield, Ripley, Long, and himself, Kelly simply remarked to Singfield that the Respondent was still non-union. According to Kelly, his reasons for doing so were that Singfield had worked for the Respondent in the past and he simply volunteered the statement to Singfield as an observation.

I credit Singfield. His version is more believable and logical. Particularly since Singfield had worked for the Respondent in the past, it would have been natural for Kelly to ask where Singfield had been working recently. When Singfield told Kelly that he had been working at Sanders, a firm which Kelly knew to be union, it would be perfectly natural for Kelly to ask if Singfield was now a member. Kelly's suggestion that he simply volunteered the observation that the Respondent's was still nonunion is unbelievable. It stands isolated and out of context, whereas Singfield's version is natural and logical. I credit Singfield that the conversation occurred as related by him.

C. Events of November 5

On November 5, 1981, Union Representative John O'Neal went to the Respondent's facility at approximately 6:30 a.m. He stationed himself on the sidewalk near one of the gates leading to the Respondent's premises, and, as employees began arriving at work that morning, he distributed authorization cards to employees. Some employees, including Singfield and Hooks, stopped and spoke to O'Neal for a few minutes and filled out union authorization cards on the spot.

Long admits that at approximately 7:15 a.m. he received a telephone call from Don Palmieri, part owner of Fulton Roofing Company, who told Long that O'Neal was in front of Kelco, and it appeared that he was trying to keep Kelco employees from going to work. After the call from Palmieri, Long watched O'Neal talking to several of the Respondent's employees. Whether he did so immediately or whether he first informed Kelly of Palmieri's call, Long approached O'Neal and told O'Neal not to come onto company property. According to Long, he approached O'Neal immediately without telling Kelly about the call from Palmieri. In Long's version of the facts, this is significant because Long claims that as he was walking back to the facility and before he had a chance to tell Kelly either about Palmieri's call or about O'Neal's presence, Long overheard Kelly tell Singfield and Hooks that they were not needed that day.

All witnesses agree that, after Singfield and Hooks stopped and spoke to O'Neal and signed authorization cards, they proceeded through a gate and down a driveway toward the Respondent's facility. As they proceeded down the hill, Singfield and Hooks met Kelly, who was walking up the driveway toward the gate. Singfield, whom I credit, testified that as they met Kelly stated to him, "What was that all about? I told you when you first came over here that I was non-union. Well, I don't think you ought to change clothes, I think you ought to get your ass over to one of them union companies." I also credit Hooks that Kelly then asked him what he had been doing and what he had been filling out, and Kelly then stated he could not use union help, that Hooks should go to Tip Top, Kaiser, or Sanders, three union firms in the Atlanta area. I do not credit Long's testimony that, as he returned to the facility after speaking to O'Neal, he overheard Kelly tell Singfield and Hooks they were to go home because there would be no tear-off that day. Nor do I credit Kelly's denial of the statements attributed to him by Singfield and Hooks or his version of that conversation.

My reasons for crediting Singfield and Hooks and discrediting Long and Kelly are many. Long's displeasure with the fact that O'Neal was confronting the Respondent's employees as they came to work is evident from the fact that he confronted O'Neal and told O'Neal to stay off of the Respondent's premises. The natural reaction by Long to the call from Palmieri and to seeing O'Neal confront employees would be to report this immediately to Long's superior, Kelly. The testimony of Singfield and Hooks, which I credit, suggests that this is precisely what Long did. This reaction would be particularly normal where, as in the instant case, Long had reason to know that Kelly was not far away having a meeting held daily about that time with production supervisors to discuss and coordinate the day's work. I do not credit Long's testimony that, after the telephone call from Palmieri, he went immediately to talk to O'Neal. The credited testimony of Singfield and Hooks shows, and on the basis of it I conclude, that at the time Kelly confronted Singfield and Hooks in the driveway, Kelly knew that they had been engaged in union activities. Further, I find contrary to the Respondent's argument

that Kelly's statements to Singfield and Hooks did constitute their discharge.²

Based on record testimony, it is impossible to determine with precision what happened on a moment-by-moment basis after Kelly confronted Singfield and Hooks in the driveway. The testimony of every witness, including Kelly, Long, O'Neal, Singfield, Hooks, and employee Sam Brunson, varies in one or more significant respects from every other witness. It was evident that every witness desired to have his testimony fit like a puzzle, positive in every detail and aligned and consistent with the testimony of other witnesses testifying for the same party. The reason for this was obvious, for the Respondent's counsel and later the General Counsel spent inordinate amounts of time cross-examining every witness about his whereabouts and the whereabouts of every other person throughout each moment of the ensuing confrontation between Kelly and O'Neal. I was not particularly impressed with this approach from either counsel, for the ability of any given witness not to become confused or to contradict the testimony of other witnesses about such minute details oftentimes is not so much a reflection of their credibility as it is a reflection of their pretrial preparation. I do not think it is either necessary or helpful to detail the testimony of each witness regarding what took place in the next few minutes after Kelly discharged Singfield and Hooks. What is clear is that Singfield and Hooks left the Respondent's premises while Kelly, with Long, went and confronted O'Neal.

My findings regarding that confrontation are based on the credited testimony of O'Neal and Hooks, who I conclude witnessed the entire incident. Hooks testified to having witnessed the incident, and the fact that he was in a position to do so is verified by Kelly. I do not rely on the testimony of Singfield which suggests that at some point during the confrontation both he and Hooks may have been across the street from where the incident was taking place. Rather, I conclude from the testimony of Hooks and Kelly that Hooks was on the same side of the street as O'Neal and Kelly, waiting at a bus stop to go home after being discharged by Kelly. I do not rely on Singfield's testimony in resolving what transpired between Kelly and O'Neal, even though Singfield's testimony about a statement made by Kelly to O'Neal is practically identical to O'Neal's testimony. Considered as a whole, Singfield's testimony about the confrontation between Kelly and O'Neal is so indefinite and confusing that I simply cannot rely on it in making any findings. Nor do I rely on the testimony of employee Sam Brunson who claims he witnessed the entire greeting and conversation between Kelly and O'Neal while variously standing and sitting many yards away perched atop a truck into which he was loading hot tar. I simply did not believe much of anything Brunson proffered.

I credit O'Neal that Kelly approached him, asked O'Neal what he was doing there, and then told O'Neal, "Get your goddamn ass off my property. I'll blow your goddamn ass off." Simultaneous with and following these statements, Kelly used his stomach or belly to bump into

O'Neal repeatedly. The fact that Kelly did so is corroborated by Hooks, who impressed me as a trustworthy witness. Hooks readily admitted on cross-examination, for example, that he was standing behind Kelly and therefore could not actually see Kelly's stomach make contact with O'Neal. While the Respondent argues that Hooks therefore could not have witnessed the significant event, I conclude otherwise, for as a practical matter the pushing out of one's stomach tends to create a spinal movement equally visible from the rear. That motion and O'Neal's reaction to it make Hooks a worthy witness to the incident. I credit O'Neal that after Kelly bumped O'Neal several times with his stomach, Kelly then grabbed O'Neal in a tight grip, a "bearhug," and lifted O'Neal off the ground.

Kelly's and Long's version of what took place struck me as having been fabricated. Long claimed Kelly did not strike O'Neal with his belly, but rather gave O'Neal a series of friendly slaps on the shoulder, using both hands. Long testified that O'Neal smiled in response and did not react with fear. Kelly, on the other hand, testified that O'Neal went limp "like he was going to defend himself." I do not for one minute believe that the Respondent thinks anyone so naive to accept its argument that Kelly, president of a small and always nonunion company, would approach O'Neal, an individual who had worked for the Respondent in the past and who had since become union business agent soliciting the Respondent's own employees in front of its facility, with great friendship and fondness to be displayed with such open affection. It is correct, as the Respondent notes, that the overall conversation between Kelly and O'Neal lasted much longer, perhaps as long as 10 to 15 minutes, than it would have taken, and did take, for Kelly to assault O'Neal as described above. It is also clear that at some point O'Neal went across the street from where Kelly confronted him, obtained something from his truck, returned to where Kelly and Long were standing, and continued further discussion with them. No witness, however, provided detail about what took place after O'Neal went to his truck or what it might have been that he went to get. Those matters are left to pure speculation. Why O'Neal went to his truck and what took place after he returned, however, is not critical to my resolution of this case and would not alter my crediting O'Neal and Hooks about Kelly's statement and actions when he first confronted O'Neal.

D. Events of November 6

Singfield and Hooks returned to the Respondent's premises on the morning of November 6 to collect their paychecks and for Hooks to get his work clothes from the change room. Hooks arrived first about 7:10 or 7:15 a.m. Hooks went into the shop, saw Long, and asked for his paycheck. Long said he could not have it until 4:30 that afternoon, the regular pay time. A few minutes later, Singfield arrived. Thereafter, Long had a rather extended conversation with Hooks and Singfield. Part of the conversation dealt with the fact that Hooks and Singfield were not prepared to go to work that day and why. During this conversation, which took place in the

² See *Sentry Investigation Corp.*, 249 NLRB 926, 927 (1980); *Du-Tri Displays*, 231 NLRB 1261, 1266 (1977).

employee change room, Kelly walked by on his way out to the workyard. Kelly asked Hooks if he was going to work. Hooks replied he was not prepared. Singfield did not reply to Kelly's question. Kelly then turned immediately and walked out into the workyard. Long continued his conversation with Hooks and Singfield. During the conversation, Long prepared and had Hooks sign a statement which reads:

11-6-81 Friday 8 a.m.

I, Henry Hooks reported to work at Kelco but did not want to work. I wanted my check early.

/s/ Henry Hooks

Wit: Michael E. Long

Also during this conversation, Long made the observation to Singfield that Singfield had never been asked to fill out an application when he came to work. Long gave Singfield an application form and asked him to fill it out. Singfield did so, but refused to sign it. He then gave it back to Long. After Hooks signed the statement prepared by Long, Singfield filled out the application form, and both were told they could not get their paycheck until 4:30 that afternoon, Hooks and Singfield left.

Such are the uncontested facts regarding what took place on the morning of November 6. Long's testimony regarding his conversation with Hooks and Singfield is intended to carry the inference, and be the support for the Respondent's argument, that Hooks and Singfield were not fired but quit and/or were offered reinstatement. Long testified as follows. The conversation with Hooks began at 7:10 or 7:15 a.m. Hooks simply told Long he was not going to work and he just wanted his check early. Long had Hooks sign a statement to that effect, and it was not until later that Hooks told Long he could not work because he was not prepared since he had been discharged the previous day. Long before that, Singfield arrived and entered the conversation. Long placed Singfield's arrival "just maybe five minutes" after Hooks. At approximately 7:30 a.m., Kelly walked by and asked Hooks and Singfield if they were ready to go to work. Hooks replied he was not prepared to work; Singfield said nothing. Kelly turned and left. Long continued to press Hooks and Singfield for a reason why they were not going to work, and it was not until then Hooks and Singfield told him they could not work because they were not prepared since they had been fired the previous day. According to Long's version, it was well after he had Hooks sign the statement saying Hooks "did not want to work" that Hooks finally told him he had been fired the previous day. I am convinced, however, that Long is not telling the truth about significant facts, and this is revealed by the statement which Long prepared and had Hooks sign. In the upper right hand corner, Long put the time "8 a.m." Thus a comparison of Long's testimony and the statement shows he prepared the statement long after he had been told by Hooks and Singfield they had been fired the previous day. I do not credit Long's assertion that either Hooks or Singfield came in on the morning of November 6 and asked for their paychecks but did not tell him they had been fired the previous day. Rather, I conclude that, when Hooks asked for

his check, Long simply told him he could not have his paycheck until 4:30 that afternoon. Whenever Long may have asked Hooks why he was not working that day, Hooks told him he was not prepared because he had been fired the previous day by Kelly and he came in that morning only to get his paycheck. After being fully aware why Hooks had come in that morning to get his check, at 8 a.m. Long prepared the statement quoted above which he somehow convinced Hooks to sign.

I also find it significant that Long went to the extreme of having Hooks sign such a statement. It is evident from the outset that Long's purpose was to create evidence. Otherwise, there was simply no reason to have Hooks sign such a statement. The question arises why Long was interested in creating evidence. If Hooks simply quit, as the Respondent claims, there was no need for Long to go to that extreme. Further, if Long really believed that Hooks was voluntarily quitting and a record of that fact was desired, Long could just as easily have said on the statement which he asked Hooks to sign that Hooks was "voluntarily quitting." From all the facts, I conclude that, when Long had Hooks sign this statement, Long knew full well that Hooks had been discharged the prior day by Kelly, and Long was attempting to create evidence which might protect Kelly by making it look like Hooks was quitting on the morning of November 6.

After Hooks and Singfield left the Respondent's premises on the morning of November 6, Long conducted an "investigation" into Singfield's work record. Long, who admitted that personnel matters were not normally a part of his duties, made what the Respondent in its brief admits was a "thorough investigation" of Singfield. Long made a special trip out to the jobsite where Singfield had been working to speak to the foreman on that crew. Although Long admitted that it was up to the foreman on the crew to assign employees their job for the day, Long testified that he was told by the foreman on Singfield's crew that Singfield was in the habit of "choosing" a laborer's job over that of a journeyman roofer. After this investigation, Long returned to the Respondent's facility. The Respondent did not call the foreman as a witness. In addition to the internal inconsistencies in Long's testimony about the responsibility to assign work as compared to Singfield's choosing easier duties, the fact that Long conducted this "investigation" into Singfield's work is highly suspicious. As I have indicated above, and as Long himself admits, personnel matters of this type are not within the normal parameters of his job. Rather, personnel matters are normally conducted by General Superintendent Jim Ripley. There is a striking similarity between the evidence gathering aspect of Long's admittedly unusual investigation and the evidence gathering aspect of the statement which Long prepared and had Hooks sign. Long's rather obvious efforts at building a case against both Hooks and Singfield belies the Respondent's claim that it thought Hooks and Singfield had quit and simply wanted their paychecks early.

Sometime in the afternoon of November 6, O'Neal telephoned the Respondent to protest Hooks' and Singfield's discharges. O'Neal spoke to Long, who told O'Neal they had not been discharged, but that their jobs

were being evaluated that day. According to Long, late in the afternoon on November 6, he and Doris Kelly, whose status with the Respondent is not identified, reviewed Hooks and Singfield. Long described this "review" as follows:

[W]e reviewed both employees; both of them had refused to work that morning; one wasn't doing the job fully, as he was hired for; and, the other one had laid out of work, and did not call in, or give an excuse or anything, and then based on that we felt that—and, with the refusing to work, that they terminated themselves.

Based on this review, Long had "Separation Notices" prepared for Hooks and Singfield which on their face indicate they were given to them that day. The "Separation Notice" given to Hooks states the following as the reasons for his separation:

Employee refused to work on the morning of 11/6/81. Employee failed to report to work or call employer's office on 11/4/81. Employee was hired on a trial basis.

The "Separation Notice" given to Singfield provides the following as the reasons for his separation:

Employee refused to work on the morning of 11/6/81. Employee was hired on a trial basis. Employee said and was hired as a journeymen roofer. Was not determined to be a journeymen roofer.

For reasons which have already been touched on above, I find that the Respondent's argument that Hooks and Singfield quit simply incredible. Even though in Long's testimony he still maintains that Hooks and Singfield "terminated themselves," it is apparent even from his testimony that in fact the Respondent discharged them, if not on November 5 then on the afternoon of November 6. The "Separation Notices" prepared by Long belie any claim that the Respondent actually believed Hooks and Singfield quit. These "Separation Notices" enumerate such a litany of shortcomings on the part of Singfield and Hooks that they were clearly intended to support a discharge. The Respondent's attempt to build a case against Hooks and Singfield has already been noted and is equally obvious from the "Separation Notices" given to Hooks and Singfield. In fact, a brief picture of Long's activities on November 6 suggest that he spent the entire day attempting to document just cause for discharging Hooks and Singfield. When Hooks and Singfield came to get their checks the morning of November 6, sometime around 7:15, Long engaged them in a conversation about their reasons for not working that day which lasted until sometime after 8 when Long prepared the statement for Hooks saying he did not want to work. Long then made a special trip to the jobsite where Singfield had been working in order to talk to the foreman about Singfield's work. Later in the day, Long spoke to O'Neal for some period of time about Hooks' and Singfield's status. The "Separation Notice" given to Hooks also reveals that at some point, and through some

means of investigation, Long determined that Hooks had not reported for work and had failed to call in November 4. In addition to all of this activity, Long also conducted a "review" of Singfield and Hooks with Doris Kelly during which it was determined that they had "terminated themselves." Finally, Long had "Separation Notices" prepared for Hooks and Singfield which he reviewed and signed. All of this was completed by 4:30 p.m. when Hooks and Singfield returned for their paychecks as they had been instructed to do by Long. All in all, the "investigation" of Singfield conducted by Long and the litany of shortcomings listed on Hooks' separation notice indicate that Long was simply attempting to bolster the Respondent's position and justify their discharges.

E. The Respondent's Position

Kelly testified that on the morning of November 5, 1981, there was a predicted 80-percent chance of rain. He claimed that solely on the basis of that prediction, before he knew anything of O'Neal's presence at the facility, he decided to send Hooks, Singfield, and other employees home for the day. I discredit Kelly's claim.

The weather reports and predictions for November 4, 5, and 6, 1981, of which I take judicial notice, suggest that Kelly is overstating the situation considerably.

The Atlanta Constitution for the morning of November 5, 1981, quotes the weather prediction in relevant part as follows:

Thursday [November 5] in Georgia will be cloudy with showers across the entire state. Highs will range from near 70 in the north to the mid 70's in the south

. . . .
In metropolitan Atlanta, there is a 70 percent chance of showers

There is, of course, a substantial difference between predicted showers and a prediction of rain. The Atlanta Journal for the evening of November 4, 1981, quotes the National Weather Service as predicting only a 30-percent chance of rain for Thursday, November 5. That forecast continues in relevant part:

Cloudy skies and mild temperatures are forecast for metropolitan Atlanta Thursday, according to the National Weather Service.

The November 4 ending Atlanta Journal also reflects that the high temperature on Tuesday, November 3, had been 71 degrees and that rainfall in the past 24 hours had equaled .00 inches. For the evening of November 5, the Atlanta Journal reflected that the high temperature on Wednesday, November 4, had been 71 degrees and that rainfall in the past 24 hours had equaled .00 inches. For Friday evening, November 6, the Atlanta Journal reported that for Thursday, November 5, the day that Hooks and Singfield were discharged, the high temperature was 77 degrees and that rainfall during the past 24 hours was an immeasurable "trace."

There are also other reasons for my not believing Kelly that the prediction of rain had anything to do with sending Hooks and Singfield home on November 5. First, the Respondent presented no corroborating testimony from any of the other employees who were supposedly sent home with Singfield and Hooks on November 5 because of the predicted rain. From the Respondent's failure to call such employees as witnesses I draw the adverse inference that other employees in fact were not sent home that day for that reason. Second, I note Kelly testified that on the morning of November 5, because of the predicted rain, he made plans to work two crews, one under Foreman Artie West and one under the supervision of Ricky Wilson. West and his crew had previously been working on a project involving roofing a new building where predicted rain is not a particular problem. Wilson and his crew had been working on a reroofing project where, according to Kelly's testimony, the prediction of rain is a major concern because of potential water damage to the contents of the building being reroofed. Kelly testified that, in view of the predicted rain, on the morning of November 5 he instructed West to take a few employees to the new roofing project and instructed Wilson to take a few employees to do cleanup at the reroofing project. Kelly further testified that only laborers are sent to do cleanup work.

Beginning on November 4, however, Singfield was reassigned from Wilson's crew to West's crew, which was working on the new roofing project where rain was not a major concern. Thus, there was no logical reason for sending Singfield home on November 5 because of the concern for rain. Further, Hooks was a laborer, which were the people sent with Wilson to do the cleanup work at the reroofing project. Thus, by the Respondent's own reasoning, it was not people such as Hooks but rather journeyman roofers on Wilson's crew who should and would have been sent home on November 5 because of the concern of rain.

All in all, the Respondent's reliance on predicted rain as the reason for sending Hooks and Singfield home on November 5 strikes me as a contrivance manufactured by the Respondent, after-the-fact in order to attempt to mask the real facts. Consequently, I reject the Respondent's claim that a prediction of rain played any part in the reason for Hooks or Singfield being sent home on November 5.

F. The Respondent's Affirmative Defense

The Respondent contends that, even if it discharged Singfield and Hooks unlawfully on November 5, it offered them reinstatement on the morning of November 6 and thus has fulfilled its remedial obligation under the Act. I reject the Respondent's argument for three reasons.

While it is clear, as the Respondent argues, that when Singfield and Hooks returned to the Respondent's facility on the morning of November 6, both Long and Kelly asked Singfield and Hooks if they were going to work, there is no indication that either actually extended an affirmative offer of reemployment. At best, the inquiries of Long and Kelly are little more than casual inquiries. In my view, they cannot be said to constitute an offer of re-

instatement which would serve the remedial purposes of the Act for there is no indication that these casual inquiries gave Singfield or Hooks reason to believe they were actually being offered their jobs back.³

Further, it is apparent that, even from the Respondent's position, this would-be offer of reinstatement was intended to be acted on immediately by Singfield or Hooks or be lost. Having been fired the previous day, neither Singfield nor Hooks came to the Respondent's facility on the morning of November 6 ready to go to work. Singfield had taken his work clothes with him when he left on November 5. Hooks had not brought lunch money. Even if Singfield and Hooks could have been able to work on November 6 by making some self-sacrifice, the Respondent cites no authority for the proposition that it can demand that Singfield and Hooks return to work immediately or lose their reinstatement rights under the Act. The Board has consistently held to the contrary. *Michael M. Schaefer*, 246 NLRB 181 (1979), and cases cited at fn. 6 therein.

There is an additional reason, however, why I would not in any event find the Respondent's action on the morning of November 6 to constitute an offer of reinstatement to Singfield and Hooks. As I have discussed above in considerable detail, Long's actions on November 6, including the rather extreme measure of documenting Hooks' "refusal" to work, the "investigation" of Singfield's performance, and the preparation of "Separation Notices" enumerating a litany of shortcomings by Hooks and Singfield, were all clearly designed to make a case against Singfield and Hooks in order to justify their termination. These actions represent the antithesis of a bona fide offer of reinstatement required to remedy an unfair labor practice in violation of the Act. Accordingly, for all of these reasons, I reject the Respondent's asserted affirmative defense that it offered to reinstate Singfield and Hooks.

CONCLUSIONS OF LAW

1. The Respondent, Kelco Roofing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union 135, United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. On October 28, 1981, the Respondent, through its president, John Kelly, interrogated William Singfield, Sr., about his membership in the Union in violation of Section 8(a)(1) of the Act.

Questions concerning union membership and union preference, in the context of job application interviews, are inherently coercive without accompanying threats, and therefore violate Section 8(a)(1) of the Act, even when the interviewee is subsequently hired. *Russell*

³ It is clear that Long having Singfield fill out an employment application form had nothing to do with Singfield being offered reinstatement. According to Long's own testimony, he did not know Singfield had been fired when he gave Singfield the application form on November 6. By Long's own version, Singfield was given an application form on November 6 because one had not been filled out when Singfield came to work earlier.

Stover Candies, 221 NLRB 441, 443-444 (1975); *Bendix-Westinghouse Automotive Air Brake Co.*, 161 NLRB 789, 791-792 (1966).

4. On November 5, 1981, the Respondent discharged Henry Hooks and William Singfield, Sr., because of their activities on behalf of, and support for, the Union, and the Respondent thereby violated Section 8(a)(1) and (3) of the Act.

5. On November 5, 1981, the Respondent, acting through its president, John Kelly, assaulted union representative John O'Neal in the presence of employees, and the Respondent thereby violated Section 8(a)(1) of the Act.

Employer assaults on union agents in the presence of employees have long been held to constitute restraint and coercion of employees in violation of Section 8(a)(1) of the Act. *Heavenly Valley Ski Area*, 215 NLRB 359 (1974), *enfd.* 552 F.2d 269 (9th Cir. 1977); *Jacques Syl Knitwear*, 247 NLRB 1525 (1980); *Martin Arsham Sewing Co.*, 244 NLRB 918 (1979).

6. For reasons stated above, I find that the Respondent did not offer Henry Hooks and William Singfield, Sr., reinstatement on November 6, 1981, and the Respondent has not fulfilled its remedial obligation under the Act.

7. The unfair labor practices which the Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Accordingly, upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER⁴

The Respondent, Kelco Roofing, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating job applicants about their membership in, activities on behalf of, and/or sentiments regarding Local Union 135, United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO, or any other labor organization.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Discharging employees because of their activities on behalf of, and support for, the Union.

(c) Assaulting union representatives in the presence of employees, thereby restraining and coercing employees in the exercise of their rights under the Act.

(d) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Offer Henry Hooks and Williams Singfield, Sr., immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

(b) Make whole Henry Hooks and Williams Singfield, Sr., for any loss of earnings or benefits they may have suffered by reason of the discrimination against them by payment to each of them of a sum of money equal to the amount he normally would have earned from the date of said discrimination to the date of the Respondent's offer of reinstatement, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(c) Expunge from its file any reference to the discharge of Henry Hooks and William Singfield, Sr., and notify them in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against them.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility located in Atlanta, Georgia, copies of the attached notice marked "Appendix."⁵ Copies of said notices, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 10 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁵ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."